

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GENERAL ATOMICS, DIAZYME
LABORATORIES DIVISION, a California
corporation,

Plaintiff,

v.

AXIS-SHIELD ASA, a Norway corporation,

Defendant.

AND ALL RELATED ACTIONS

Case No. 3:05-cv-04074 SI

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE OF
GENERAL ATOMICS',
CAROLINA CHEMISTRIES', AND
AXIS-SHIELD'S REMAINING
CLAIMS AND COUNTERCLAIMS
REGARDING THE '127 AND '717
PATENTS AND [PROPOSED]
ORDER**

Judge: The Honorable Susan Illston

WHEREAS on October 11, 2005, General Atomics, Diazyme Laboratories Division ("General Atomics") filed a complaint seeking a declaratory judgment that its enzymatic homocysteine assay does not infringe U.S. Patent No. 5,631,127 ("the '127 patent"), U.S. Patent No. 5,958,717 ("the '717 patent"), U.S. Patent No. 5,827,645 ("the '645 patent"), and U.S. Patent No. 6,063,581 ("the '581 patent") (collectively, the "patents-in-suit"), and further seeking a declaration that the patents-in-suit were invalid and unenforceable;

WHEREAS on October 27, 2005, Axis-Shield ASA ("Axis-Shield") answered General

1 Atomics’ declaratory judgment complaint; denied the allegations of noninfringement, invalidity,
2 and unenforceability; and filed counterclaims of patent infringement by General Atomics and
3 Carolina Liquid Chemistries Corporation (“Carolina Chemistries”);

4 WHEREAS on November 16, 2005, Carolina Chemistries replied to Axis-Shield’s
5 counterclaims of patent infringement; denied the allegations; and filed counterclaims seeking a
6 declaration that any enzymatic homocysteine assay sold or distributed by Carolina Chemistries
7 does not infringe the patents-in-suit and further seeking a declaration that that patents-in-suit were
8 invalid and unenforceable;

9 WHEREAS on November 17, 2005, Axis-Shield denied the allegations in Carolina
10 Chemistries’ counterclaims;

11 WHEREAS on February 15, 2006, the parties stipulated, and the Court ordered, that the
12 claims and counterclaims relating to the ‘645 and ‘581 patents would be dismissed with
13 prejudice;

14 WHEREAS on March 3, 2006, Axis-Shield identified two accused products: (1) an
15 enzymatic homocysteine test kit sold by both General Atomics and Carolina Chemistries, and (2)
16 a homocysteine microplate test kit sold by only General Atomics (aka, the “microtiter assay”);

17 WHEREAS on July 19, 2006, the Court granted General Atomics’ and Carolina
18 Chemistries’ motion for summary adjudication that its enzymatic homocysteine test kit did not
19 infringe the ‘127 and ‘717 patents;

20 WHEREAS on August 9, 2006, the Court granted Axis-Shield’s motion to amend its
21 infringement contentions;

22 WHEREAS on September 27, 2006, the Court issued an order construing certain disputed
23 claim terms;

24 WHEREAS on April 11, 2007, the Court granted General Atomics’ and Carolina
25 Chemistries’ motion for summary judgment that the patents-in-suit were invalid and unenforceable;
26 and that the claims of the patents-in-suit were invalid and unenforceable;
27 and that the claims of the patents-in-suit were invalid and unenforceable;
28 and that the claims of the patents-in-suit were invalid and unenforceable;

Chemistries' second motion for summary judgment that the enzymatic homocysteine assay does not infringe the '127 and '717 patents. The Court held that a triable issue of fact remained regarding infringement by the homocysteine microplate test kit sold by General Atomics but not by Carolina Chemistries, and summary judgment as to that product was denied;

WHEREAS General Atomics and Axis-Shield hereby stipulate to dismiss without prejudice Axis-Shield's claim of infringement by General Atomics based on the making, using, selling, and offering to sell the homocysteine microplate test kit;

WHEREAS General Atomics, Carolina Chemistries, and Axis-Shield hereby stipulate to dismiss without prejudice General Atomics' and Carolina Chemistries counterclaims of invalidity and unenforceability;

WHEREAS General Atomics, Carolina Chemistries, and Axis-Shield further agree that after the dismissals without prejudice of Axis-Shield's claim of infringement by General Atomics based on the making, using, selling and offering to sell the homocysteine microplate test kit and General Atomics' and Carolina Chemistries counterclaims of invalidity and unenforceability, there are no remaining claims or counterclaims in this action;

NOW, THEREFORE, General Atomics, Carolina Chemistries, and Axis-Shield hereby AGREE AND STIPULATE as follows:

(1) General Atomics' and Carolina Chemistries' claims and counterclaims for declaratory judgment of invalidity and unenforceability of the '127 and '717 patents shall be dismissed without prejudice;

(2) Axis-Shield's claims of infringement based on General Atomics' making, using, selling, or offering to sell a homocysteine microplate test kit shall be dismissed without prejudice;

(3) General Atomics agrees that the statute of limitations on damages for patent infringement as to the homocysteine microplate test kit shall be tolled during the pendency of any timely appeal in this action;

(4) As to the claims that are dismissed without prejudice by this stipulation and order, each party shall bear its own costs and fees;

(5) As to the claims resolved by the above-referenced summary judgment motions, the taxing of costs shall be stayed until after the completion of any timely appeal of this action; and

(6) Final judgment of noninfringement pursuant to the motions for summary judgment referenced above shall be entered in favor of General Atomics and Carolina Chemistries and against Axis-Shield in the form of Exhibit A hereto. Axis-Shield approves entry of judgment pursuant to Exhibit A as to form only without prejudice to its right to appeal, which right to appeal is expressly reserved by Axis-Shield.

Dated: April 30, 2007

KIRKPATRICK & LOCKHART PRESTON
GATES ELLIS LLP

By: /s/ Timothy P. Walker

Timothy P. Walker
Elaine Y. Chow

VOSS, COOK & THEL LLP
Paul C. Nyquist
Attorneys for Defendant/Cross-Complainant
AXIS-SHIELD ASA

1 Dated: April 30, 2007

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GENERAL ATOMICS, DIAZYME

LABORATORIES DIVISION and

Counterdefendant-counterplaintiff

CAROLINA LIQUID CHEMISTRIES

CORPORATION

10 PURSUANT TO STIPULATION, IT IS SO ORDERED.

12 Dated: _____



13 The Honorable Susan Illston

United States District Judge

General Order 45 Attestation

I, Anders T. Aannestad, am the ECF User whose ID and password are being used to file this STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF GENERAL ATOMICS', CAROLINA CHEMISTRIES', AND AXIS-SHIELD'S REMAINING CLAIMS AND COUNTERCLAIMS REGARDING THE '127 AND '717 PATENTS AND [PROPOSED] ORDER. In compliance with General Order 45, X.B., I hereby attest that Timothy P. Walker has concurred in this filing.

/s/ Anders T. Aannestad
Anders T. Aannestad